

ISSN: 2068 –5459

ADMINISTRATIO

Differentiation between the Crime of Capital Market Manipulation and the Crime of Deception

Ștefănuț Radu¹

Abstract: The object of this scientific study is represented by the comparative analysis between the critical-legal perspective of the element of differentiation between the two incriminations, respectively of the crime of capital market manipulation and of the crime of deception. The result of this approach consists in obtaining a better delimitation of the object of incrimination of the crime of capital market manipulation and of the crime of deception, aspects that practitioners can discover when drafting a better legal implementation of a concrete offense. The conclusion is that the crime of capital market manipulation, due to particular elements, although apparently a form of deception, is an independent crime against the business environment, being a practical application of the principle of law *specialia generalibus derogant*.

Keywords: capital market manipulation; crime of deception; business environment

The manipulation of the capital market, according to the official definition posted on the NYSE website, is "an illegal operation consisting of the purchase or sale of financial instruments in order to create a false or wrong appearance of an active trading or to increase or decrease the price of financial instruments to determine other investors to sell or buy those financial instruments."

Another concept that needs to be defined is *speculation*, which has the meaning of "taking risks above average with the hope to obtain above average returns, generally in a relatively short period of time. Speculation involves buying a particular financial asset based on its potential selling price and not on its present value. In a speculation the security of the principal and the current income are of secondary importance"². The specification is necessary because in Romanian, the

¹ Associate Professor, PhD., "Danubius" University of Galati, Romania, Address: 3 Galati Blvd., 800654 Galati, Romania, Tel.: +40372361102, Fax: +40372361290, Corresponding author: stefanut.radu@univ-danubius.ro.

² www.eafacere.ro.

term speculator has a more unfavourable meaning, while in the Western world, being a speculator is a title of glory. He is seen as a specialist in a certain field, usually financial, able to see things that the vast majority of people do not notice, to notice certain opportunities, to find the necessary levers and to act so as to make a profit. This profit does not emerge by kneeling the opponents, but by observing the direction in which the market is moving (demand and supply).

A distinction must also be made between *manipulation* and *speculation*, the latter assuming “a necessary activity on the financial markets, because it brings more liquidity to the market, eliminates price fluctuations and helps balancing thereof by purchasing undervalued assets and selling overvalued assets. (Pop, 2003, p. 14)”

Always, the huge gain of some speculators means huge losses of others, because this is what manipulation entails: a zero-sum game, where some get rich and others go bankrupt. But *manipulation* is not always illegal: it is of course illegal to “move” the market using confidential information or false rumors about a company but limiting the ability of market agents to place sale or purchase orders of a certain size is an attack on the market principle.

One aspect that needs to be clarified is the phrase *market manipulation* itself, as it refers to the manipulation of the participants in the capital market and we cannot speak of manipulation if there are no victims. Thus, by manipulation we will mean “misleading investors about the price or liquidity of one or more financial instruments and not all financial instruments traded on that market (Duțescu, 2008, p. 5)”.

A concise classification of manipulation methods is the one described in the CESR guideline, but it should be noted that most of the time, *the manipulation* is not performed by a single method, but by a combination thereof, which makes the effects even more negative.

False or misleading transactions - transactions that have as their main effect the artificial increase or decrease of the price, demand or supply for that investment by creating a false image or misleading investors.

Price manipulation - a form of manipulation by which investors are prevented from trading at fair, naturally set prices. According to the European Directive, in order to determine whether a person knowingly manipulated the price of a share, account must be taken of the extent to which that person had a direct or indirect interest in the price of that investment, the volume and size of transactions performed by that

person in relation to the expectations of market liquidity at that time, as well as the extent to which the transactions carried out by that person caused the price to rise or fall. Price *manipulation* is considered one of the most widely used methods of manipulation and can be done through various techniques.

Transactions involving fictitious procedures - this type of manipulation essentially involves the use and/or dissemination of information, reports, analyzes, false or incomplete regardless of whether they are positive or negative to a particular issuer. An important point to keep in mind is that the dissemination of such information is not considered manipulative unless the manipulator himself enters into transactions at artificial prices determined by his action or that of his accomplices.

Dissemination of false or misleading information. One of the most common instruments used by manipulators is information and that is why the information system should be very selective in assimilating market information, which is transmitted on very different channels: press, TV, internet, press conferences, GMS, brokers, analysts, public releases, BSE, financial reports, various investors, etc.

With the development and modernization of the means of communication, the technological evolution has started to play an increasing role in the ways of influencing investors, by disseminating information contrary to reality, all the more so as the development of the Internet has created the necessary premises for such incomplete or erroneous information to reach a very large number of people in a very short time.

Dissemination, in this case, is carried out taking advantage of the publicity formalities that must be fulfilled on the occasion of the convening of the general meetings of shareholders, ordinary or extraordinary. It is worth mentioning that any summon together with the agenda is published in the Official Gazette, part IV as well as in a newspaper of wide circulation, being in this way fulfilled the requirement to disseminate information to the public.

It must be borne in mind that the illegalities committed on the capital market put investigators to trouble. Although they are part of a special category, crimes in this field affect the Romanian business environment. Virtually, everything that happens on the capital market influences the national economy. Based on the investigations carried out in the files they are working on, in collaboration with the prosecutors

from DIICOT, the General Directorate for Combating Organized Crime within the IGPR says that one of the methods used in illegalities is *manipulation*.¹

In Romania, according to art. 279 of Law no. 297/2004² it is established that: “It constitutes an offense and shall be punished with imprisonment from 6 months to 5 years and the prohibition of some rights: a) intentionally presenting by the manager, director or executive director of the company to the shareholders inaccurate financial statements or unreal information on the economic conditions of the company; b) committing the offenses provided for in art. 245-248; c) the intentional access by unauthorized persons to the electronic trading systems, with deposit or clearing-settlement.”, and in considerations of the provisions of art. 248, stipulate that: “It is forbidden for any natural or legal person to engage in market manipulation activities (Hotca & Dobrinoiu, 2009, p. 156-157)”.

Of course, in order to retain the analyzed crime, in this case it is necessary that the GMS be summoned abusively. The abusive character can result from the recurrence of the summons at regular intervals of time, corroborated with the rejection in block of the requests by the constituted assemblies. Thus, the law provided in art. 119 of Law no. 31/1990 which confers the possibility of the shareholders representing, individually or together, at least 5% of the share capital to request the summon of the general meeting is diverted from its purpose.

The motivation of the conduct of the active subjects consists in taking over the control of the executive management, by trading the shares at a diminished price, situation in which the offense is committed with eventual intention.

As jurisprudence, Decision no. 865 of 13th of March 2013, rendered by the criminal chamber of the High Court of Cassation and Justice, *having as object the crime of capital market manipulation*, which decided that the *crime of capital market manipulation* provided in art. 279 paragraph (1) combined with art. 248 related to art. 244 paragraph (5) letter a) of Law no. 297/2004 can be committed only in connection with the financial instruments admitted to trading on a regulated market or with the financial instruments for which an application for admission to trading on a regulated market has been registered, according to art. 253 of Law no. 297/2004. In relation to the judgment of the Court of Justice of the European Union

¹ <http://www.curierulnational.ro>.

² Official Gazette no. 571 of June 29, 2004, with the amendments brought by: Law no. 208/2005, Government Ordinance no. 41/2005, Law no. 97/2006, Law no. 11/2012, Government Emergency Ordinance no. 32/2012, Law no. 167/2012, Law no. 187/2012, Government Emergency Ordinance no. 90/2014, Government Emergency Ordinance no. 32/2012, Law no. 312/2015.

on the crime of capital market manipulation (Second Chamber) of 22th of March 2012 in Case C-248/11, the RASDAQ market does not constitute a regulated market within the meaning of the art. 279 paragraph (1) combined with art. 248 related to art. 244 paragraph (5) letter a) of Law no. 297/2004 and, consequently, the actions described in the incrimination norm, committed in connection with the RASDAQ market, do not constitute the crime provided in art. 279 paragraph (1) combined with art. 248 reported to art. 244 paragraph (5) letter a) of Law no. 297/2004.

Given the legal nature of the stock exchange transaction, that of the contract, it can be stated that this content of *the crime of capital market manipulation* has certain differences compared to that of *the crime of fraud*, which we will analyze below.

A first differentiation of the 2 crimes consists in the *legal object* of the two crimes, being analyzed as follows:

We appreciate that, *the generic legal object* of the crime of manipulation of the capital market is the public confidence of the investors or of the potential investors in the normal performance of the activity in the field of the capital market. Such an area, of overwhelming importance for the market economy of a state, requires adequate legal protection. Depending on the importance of the social value and the severity of its danger, the legislator has identified those behaviours whose existence in the field of social relations regarding the capital market would create serious dysfunctions. In order to prevent them, they resorted to incrimination thereof, thus offering the field a juridical-criminal protection, according to our appreciation, indispensable.

The special legal object is given by the social relations regarding the veracity of the information contained in the financial statements¹ of the companies admitted to trading on a regulated market or the reality of other information presented to the shareholders regarding the economic situation of the company.

Within the crime of deception, *the generic legal object* of crimes against patrimony is constituted by the relations whose formation, progress and development are ensured by defending the patrimony, mainly in terms of real rights regarding assets and implicitly in terms of the obligation to maintain the physical position of the

¹ The official documents for presenting the economic-financial situation of the persons provided in art. 1 are the annual financial statements, established according to law, which must provide a true and fair view of the financial position, financial performance and other information relating to the activity carried out.

asset within the patrimony, this being part of the general pledge of unsecured creditors (Duvac, 2012, p. 107). The patrimony protected by the legal norms of this incrimination has as holder the natural person or the legal person. They are not necessarily the owners of the property on which the deed is committed.

The law does not only protect the right to property, the possession being protected to the same extent, along with the precarious detention that enjoys the same protection regime. There are cases where the rightful possession or detention is protected even against the owner (Loghin & Filipaş, 1992, p. 91).

The special legal object of the crime of deception is formed by the patrimonial social relations defended by the criminal norm and based on the good faith and mutual trust of the two parties that are necessary for the formation and development of normal patrimonial relations, they being attributes for the social value of the patrimony, without which this value can no longer generate normal social relations. Or, precisely the assurance of these relations is the object of protection of the crime from article 244 of the Criminal Code.

Regarding the manipulation of the capital market, *the active subject* is qualified being the manager, the director and/or the executive director of a commercial company. We appreciate that it would have been opportune that the norm of art. 237 paragraph 3 of the capital market law should also refer to the legal representative of the company. For a good understanding of the qualification of *the active subject* of this crime, details regarding the management of the joint stock company are required.

The perpetrator of the deceit crime may be, according to the provisions of art. 244 of the Criminal Code, any natural or legal person, with criminal legal capacity, who commits the material element, namely the action of misleading.

The perpetrator is not circumstantiated by law but can only be the one who misled the victim directly. He can commit the crime, both by an action (commissive) and by an inaction (omissive).

It is also worth mentioning that the deception can be committed in any form of participation: authorship, co-authorship, instigation or complicity (Predescu; Bula; Duvac; Griga; Ivan; Gheorghe; Mitrache, Constantin; Molnar; Pascu & Pască, 2010, p. 487). The law does not therefore require a certain quality for the active subject of this crime.

In the case of capital market manipulation, *the passive subject* is also qualified as a shareholder of the respective company, and the quality of *passive subject* can only be held by those persons who have concluded transactions with securities on which the manipulation action has been exercised.

The passive subject of the crime of deception is any natural or legal person, not circumstanced by law, whose patrimony has been harmed, directly damaged by the commission of the crime. The existence of the crime of deception is not conditioned by the occurrence of a damage in the patrimony of the person against whom the act of misleading was exercised, but the damage can be caused to a person distinct from the one who was misled.

It should be mentioned that *the immediate consequence* of the two deeds in the field of criminal wrongdoing are different, meaning that we will analyze them below, as follows:

The immediate consequence of the crime of capital market manipulation consists in the imbalance of the capital market as a result of the fraudulent diminution of the value of the shares, the effect being the loss of traders in the stock market system as a means of economic exchange.

It should be emphasized, however, that in the case of capital market manipulation it is sometimes difficult to determine the exact accuracy of the damage, given that it is not always possible to determine precisely what would have been the correct price of the financial instruments on which price manipulation actions were exercised in the event that these illicit actions had not existed.

The immediate consequence of the *deception* offense is a material injury to the deceived person¹. Deception falls into the category of crimes for the existence of which the law requires the production of a material result, this aspect resulting from the requirement *to cause damage*. Being a result crime (perceptible change of reality), the immediate consequence is determined not by a state of danger, but by an actual damage, damage that occurs in the victim's patrimony, because the legislator seeks to protect the patrimony of persons.

The immediate consequence must be proven by the immediate result that harms the social relations with patrimonial character that must be based on trust and good faith. For the existence of the crime of deception in the consumed/typical form,

¹ <http://www.rolii.ro/hotarari/5a96206be49009dc1e000061>.

within *the immediate consequence*, an effective, concrete and certain material damage must be ascertained.

If no damage was actually caused by misleading, but the other constituents are met and the offense was capable of causing material injury (damage), then the crime will remain in the attempt stage. In addition, if the misleading is exercised for a purpose other than that of obtaining for oneself or for another an unjust patrimonial benefit, then we are not faced with a deception according to art. 244 New Criminal Code.

In case of manipulation of the capital market, *the place of commission* of this offense is determined directly or indirectly by the provisions of Law no. 297/2004. Thus, in the form provided by art. 244 paragraph 5 letters a) and b) the offense can be committed only on the regulated market or the alternative trading system on which are listed the respective financial instruments on which the manipulation action is exercised.

In the hypothesis provided by art. 244 paragraph 5 letter c), the offense can be committed only through mass media, internet or other similar means of communication.

The place of commission of the crime of deception is not circumscribed by the provisions of the Criminal Code, basically this criminal offense can happen anywhere.

It should also be mentioned that the qualification of punishments has a special differentiation, meaning that the punishments provided by *the crime of deception* are listed as follows: according to the provisions of paragraph (1) and (2) with imprisonment from 6 months to 3 years, respectively from one to 5 years, and in the case of *the crime of capital market manipulation* with imprisonment from 6 months to 5 years and the prohibition of certain rights, according to art. 279 of Law no. 297/2004.

Conclusions

The object of this scientific study is represented by the comparative analysis between the critical-legal perspective of the element of differentiation between the two incriminations, respectively of the crime of capital market manipulation and of the crime of deception.

The result of this approach consists in obtaining a better delimitation of the object of incrimination of the crime of capital market manipulation and of the crime of deception, aspects that practitioners can discover when drafting a better legal implementation of a concrete offense.

The conclusion is that the crime of capital market manipulation, due to particular elements, although apparently a form of deception, is an independent crime against the business environment, being a practical application of the principle of law *specialia generalibus derogant*.

References

- Dușescu, C. (2008). *Manipularea pieței de capital/ Capital market manipulation*. Bucharest: C.H. Beck Publishing House.
- Duvac, C. (2012). Înșelăciunea în noul Cod penal/ Deception in the new Criminal Code. *Dreptul/The law*, p. 107.
- Hotca, M. A., & Dobrinou, M. (2009). *Elemente de drept penal al afacerilor/ Elements of criminal business law*. C.H. Beck Publishing House.
- Loghin, O., & Filipaș, A. (1992). *Drept Penal Român. Partea specială/ Romanian Criminal Law. The special part*. Bucharest: Șansa Publishing House.
- Pop, C. (2003). *Tranzacții și piețe financiare internaționale/ International financial transactions and markets*. Cluj: Clujeana University Press.
- Predescu, O.; Bula, C.; Duvac, C.; Griga, I.; Ivan, Gh.; Mitrache, C.; Molnar, I.; Pascu, I. & Pască, V. (2010). *Explicații preliminare ale noului Cod penal/ Preliminary explanations of the new Criminal Code, volume I*. Bucharest: Universul Juridic Publishing House.